Guideline Sentencing Update

FEDERAL JUDICIAL CENTER

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Determining the Sentence

FINES

Third Circuit holds that a fine—including a departure to a larger fine—may be based on potential future earnings from sale of rights to story of the crime, but the value of those rights must be supported by evidence. Defendants, husband and wife, kidnapped a business executive to hold for ransom. Although the victim died within four days from a wound suffered during the kidnapping, defendants continued their attempts to receive ransom for six weeks, during which time the case generated extensive media coverage. The husband pled guilty to seven felony counts, the wife to two, and both were given lengthy prison terms. They were also subject to fines up to $250,000 under § 5E1.2(c); however, the district court departed and imposed the maximum fines allowed under 18 U.S.C. § 3571—$250,000 for each felony conviction—equaling $1.75 million for the husband and $500,000 for the wife. Both defendants had received offers for the rights to their stories, and the court determined that their potential gains required a departure to "ensure both the disgorgement of any gain from the offense . . . and an adequate punitive fine." *See* U.S.S.G. § 5E1.2, comment. (n.4).

The appellate court remanded because there was no evidence that defendants' rights were worth those amounts, but approved the use of future story rights as a basis for fines and, in an appropriate case, for upward departure. "Future earning capacity is obviously an appropriate factor to consider. . . . At least in cases such as this, when it is a near certainty that the literary and other media rights to the story of a crime are marketable, possible future sales of those rights may be considered when determining whether a defendant is able to pay a fine. . . . [W]e are convinced that, given the facts and circumstances surrounding this highly publicized crime, the district court was realistic in finding that [defendants] might become able to pay a fine in the future."

However, "while it is entirely proper in cases such as this for district courts to look to potential sales of literary and other media rights as a source of future income . . ., the value of those rights must be supported by more than hypothesis or speculation to justify departures from the applicable Guidelines fine range. This is especially so where Congress has chosen to permit only the government to initiate a petition for modification of a fine if circumstances change so that a defendant is truly unable to pay it." The evidence that the husband had the potential ability to pay a $1.75 million fine did not meet the clear and convincing standard of proof the appellate court held was required for a sevenfold departure from the maximum Guidelines fine. *See U.S. v. Kikumura*, 918 F.2d 1084, 1100–02 (3d Cir. 1990) (extreme departures must meet clear and convincing standard). The court also held that, even under the preponderance standard, the facts did not support the finding that the wife could pay a larger fine. *Cf. U.S. v. Wilder*, 15 F.3d 1292, 1300–01 (5th Cir. 1994) (affirming upward departure to $4 million fine because defendant gained at least $2 million and caused losses exceeding $5 million).

U.S. v. Seale, No. 92-5686 (3d Cir. Apr. 7, 1994) (Lewis, J.).

Outline at V.E.1, VI.B.1.a and h, and IX.B.

U.S. v. Robinson, No. 92-10196 (9th Cir. Apr. 4, 1994) (Brunetti, J.) (Remanded: District court must determine defendant's ability to pay fine at the time of sentencing and cannot impose community service as an alternative sanction should defendant prove unable to pay fine after release from prison. "The Guidelines do not state explicitly that the district court must make the [ability to pay] determination at the time of sentencing, but they strongly imply such a requirement. . . . [T]he structure of § 5E1.2 indicates that the district court, before imposing any fine, must determine whether the defendant has established [the] inability" to pay. As to the community service, 18 U.S.C. § 3572(e) states that "the court may not impose an alternative sentence to be carried out if the fine is not paid." The appellate court also noted that, under Guidelines § 5E1.2(f), an alternative sanction such as community service "must be imposed 'in lieu of all or a portion of [a] fine'; community service cannot be imposed as a fallback punishment to be served if the defendant cannot later pay the fine."). *Outline* at V.E.1.

CONSECUTIVE OR CONCURRENT SENTENCES

U.S. v. Kiefer, No. 93-2247 (8th Cir. Apr. 1, 1994) (Loken, J.) (Remanded: Defendant was convicted on a federal firearms charge and, under § 5G1.3(b) and comment. (n.2), was to receive a sentence that was concurrent to his state sentence on related charges, with credit for the 14 1/2 months served on the state sentence. However, he was also subject to a mandatory minimum fifteen-year sentence under 18 U.S.C. § 924(e), and the district court determined that it could not make the sentences completely concurrent by giving full credit for time served because that would effectively put the federal sentence below the mandatory minimum. The appellate court remanded, holding that "§ 924(e)(1) does not forbid concurrent sentencing for separate offenses that were part of the same course of conduct. In these circumstances, although the issue is not free from doubt, we conclude that time previously served under concurrent sentences may be considered time 'imprisoned' under § 924(e)(1) if the Guidelines so provide."). *Outline* generally at V.A.3.

Sentencing Procedure

EVIDENTIARY ISSUES

U.S. v. Beler, No. 92-3970 (7th Cir. Mar. 31, 1994) (Rovner, J.) (Remanded: Agreeing with *U.S. v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993), that "section 6A1.3(a)'s reliability standard must be rigorously applied" to evidence used in

sentencing. Here, a witness made contradictory statements regarding cocaine amounts that were not in the offenses of conviction. The district court included as relevant conduct amounts from one of the witness's higher estimates, but did not "directly address the contradiction and explain why it credit[ed] one statement rather than the other. . . . Before the court relies on the higher estimate, it must provide some explanation for its failure to credit the inconsistent statement. . . . [Defendant] simply has too much at stake for us to be satisfied with a conclusory factual finding based on potentially unreliable evidence." The appellate court also agreed with other circuits that have held that addict-witness testimony should be closely scrutinized: "[T]he district court should have subjected any information provided by [that witness] to special scrutiny in light of his dual status as a cocaine addict and government informant.").
Outline at IX.D.1.

Fed. R. Crim. P. 35(c)

U.S. v. Portin, No. 93-10397 (9th Cir. Apr. 1, 1994) (per curiam) (Remanded: District court exceeded its authority by increasing defendants' fines when it granted their Rule 35(c) motion to reduce their prison sentences to conform to the Rule 11(e)(1)(C) plea agreement. Rule 35(c) "authorizes the district court to correct obvious sentencing errors, but not to reconsider, to change its mind, or to reopen issues previously resolved under the Guidelines, where there is no error." Here, the original fines were properly imposed, and neither defendants nor the government challenged them on appeal.).
Outline at IX.F.

Adjustments

Obstruction of Justice

U.S. v. Fredette, 15 F.3d 272 (2d Cir. 1994) (Affirmed: Defendants, convicted of witness retaliation offenses and sentenced under the "Obstruction of Justice" guideline, § 2J1.2, were properly given § 3C1.1 enhancements for additional attempt to obstruct justice. "We conclude that Application Note 6 (to § 3C1.1) applies to cases in which a defendant attempts to further obstruct justice, provided that the obstructive conduct is significant and there is no risk of double counting. Regardless of whether the defendants in this case were successful in their efforts to obstruct justice, the fact remains that they used a false affidavit in an effort to derail the investigation and prosecution of their respective cases.").
Outline at III.C.4.

Violation of Supervised Release

Sentencing

U.S. v. Sparks, No. 93-3677 (6th Cir. Mar. 22, 1994) (Guy, J.) (Remanded: District court erred in concluding that, under § 7B1.3(f), revocation sentence *must* be consecutive to state sentences imposed earlier for the conduct that caused revocation. Appellate court reaffirmed its holding before *Stinson v. U.S.,* 113 S. Ct. 1913 (1993), that "the lower court must consider, but need not necessarily follow, the Sentencing Commission's recommendations regarding post-revocation sentencing" in Chapter 7.).
Outline at VII and VII.B.1.

U.S. v. Malesic, 18 F.3d 205 (3d Cir. 1994) (Remanded: Supervised release may not be reimposed after revocation and imprisonment. Thus it was error to revoke defendant's three-year term of release and sentence him to eighteen months' imprisonment to be followed by a three-year term of supervised release.).
Outline at VII.B.1.

Offense Conduct

Calculating Weight of Drugs

U.S. v. Vincent, No. 93-1910 (6th Cir. Mar. 31, 1994) (Milburn, J.) (Affirmed: Because evidence showed that the stalks and seeds of marijuana plants contain "a detectable amount of the controlled substance," § 2D1.1(c) (n.*), "the stalks and seeds need not be separated before the controlled substance can be used. Accordingly, the stalks and seeds are to be used in calculating the weight of a controlled substance.").
Outline at II.B.2.

U.S. v. Tucker, No. 93-2806 (7th Cir. Mar. 23, 1994) (Wood, J.) (Affirmed: District court correctly used weight of cocaine base at time of arrest for Guidelines and mandatory minimum sentence purposes, rather than the smaller weight when reweighed several months later. It was undisputed that the weight loss was due to the evaporation of water, and water is part of the drug "mixture," not an excludable carrier medium or waste product.).
Outline at II.B.1.

More Than Minimal Planning

U.S. v. Bridges, No. 93-3175 (10th Cir. Mar. 17, 1994) (McKay, J.) (Remanded: Defendant participated in two burglaries and pled guilty to theft of government property from the second burglary. The district court enhanced the sentence for more than minimal planning under § 2B1.1(b)(5), solely on the ground that defendant's conduct "involv[ed] repeated acts over a period of time," § 1B1.1, comment. (n. 1(f)). The appellate court remanded, finding that the examples given in Note 1(f) "demonstrate that the Guidelines equate 'repeated' with 'several,'" meaning "more than two." Thus, when a district court "bases the two-point increase solely on the 'repeated acts' language of the Guidelines, there must have been more than two instances of the behavior in question.").
Outline at II.E.

Departures

Substantial Assistance

U.S. v. Chavarria-Herrara, 15 F.3d 1033 (11th Cir. 1994) (Remanded: In reducing defendant's sentence under Fed. R. Crim. P. 35(b) for substantial assistance, the district court erred in considering defendant's "status as a first time offender, his lack of knowledge of the conspiracy until just prior to arrest, his relative culpability, and his prison behavior. . . . The plain language of Rule 35(b) indicates that the reduction shall reflect the assistance of the defendant; it does not mention any other factor that may be considered.").
Outline at VI.F.4.

Changes to previously reported cases:

U.S. v. Forrester, 14 F.3d 34 (9th Cir. 1994), *withdrawn* and revised opinion filed Mar. 25, 1994. Holding is essentially the same as reported in 6 *GSU* #10.

U.S. v. Calverley, 11 F.3d 505 (5th Cir. 1993), *reh'g en banc granted* Feb. 18, 1994. See 6 *GSU* #8 and *Outline* at IV.B.2.